



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of Claims Against the Dealer Bond
of D and Ry's, Inc., d/b/a Roger's Auto Sales

Case Nos: DOT-15-0004
and DOT-15-0012

FINAL DECISION

On November 10, 2014, Sarah Swihart filed a claim with the Wisconsin Department of Transportation (Department) against the motor vehicle dealer bond of D and Ry's, Inc., d/b/a Roger's Auto Sales, (Dealer). On February 23, 2015, Kenneth Guman filed a claim with the Department against the motor vehicle dealer bond of the Dealer. Pursuant to the procedures set forth at Wis. Admin. Code § Trans 140.26, a Public Notice to File Dealer Bond Claims was published in the Burlington Standard Press, a newspaper published in Burlington, Wisconsin, on April 23, 2015. The notice informed other persons who may have claims against the Dealer to file them with the Department by June 22, 2015. No additional claims were filed. The Swihart and Guman claims were forwarded by the Department to the Division of Hearings and Appeals.

On August 10, 2015, a Preliminary Determination pursuant to Wis. Admin. Code § Trans 140.26(5)(a), was issued in this matter. On September 6, 2015, Gustave Kozarczewski, on behalf of the Dealer, filed an objection to the Preliminary Determination. Pursuant to due notice, an evidentiary hearing was conducted in Burlington, Wisconsin, on November 2, 2015. Mark F. Kaiser, Administrative Law Judge, presided.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c) the PARTIES to this proceeding are certified as follows:

Sarah Swihart
S74W17360 Richard Lane
Muskego, WI 53150-9303

Kenneth Guman
222 Loy Drive
Pelham, NC 27311

Gustave Kozarczewski
D and Rys, Inc.
10680 Painted Desert Court
Huntley, IL 60142

Platte River Insurance Company, by

Beth Jenks
P.O. Box 5900
Madison, WI 53705

Only Gustave Kozarczwski and Beth Jenks appeared at the hearing. Neither Mr. Kozarczwski nor Ms. Jenks disputed any of the findings related to the actions of the Dealer in the Preliminary Determination. Mr. Kozarczwski objection to the Preliminary Determination was the orders to pay the claimants for their respective losses. Mr. Kozarczwski contended that a better remedy in this matter would be to have the bond company pay off the amounts he owes to the motor vehicle dealers from which he purchased the vehicles he sold to the claimants. Those dealers would then release the titles and the Department could issue titles to the claimants. This would resolve their claims against the motor vehicle dealer bond of D and Ry's, Inc. This solution has some appeal, but is beyond the scope of the Division of Hearings and Appeals' authority under Wis. Admin Code chap. Trans 140. Specifically, Wis. Admin Code § Trans 140.21(1) allows claims for monetary damages sustained by the claimant. The solution proposed by Mr. Kozarczwski requires the order of payments to third parties for the purpose of allowing the claimants to obtain titles to their vehicles. This is an equitable remedy beyond the authority of an administrative agency. Additionally, pursuant to Wis. Admin Code § 140.21(2)(a), claims made by other motor vehicle dealers are not allowed.

Ms. Jenks did not object to the payment of the purchase price of their vehicles to the claimants. However, she objected to Kenneth Guman's claim for storage and rental fees. Mr. Guman drove the vehicle almost 14,000 miles from the time he purchased the vehicle and filed a complaint against the Dealer. It is unknown how many additional miles the vehicle was driven after the complaint was filed. Additionally, the Department issued temporary plates to Mr. Guman for the vehicle so he could have lawfully operated it rather than store it and rent another vehicle. The Final Decision is amended to disallow the portion of Mr. Guman's claim for reimbursement for storage and rental fees. Except for this amendment, the Preliminary Determination is adopted as the Final Decision in this matter.

FINDINGS OF FACT

1. D and Ry's, Inc., d/b/a Roger's Auto Sales (Dealer) was a motor vehicle dealer licensed by the Wisconsin Department of Transportation (Department) pursuant to Wis. Stat. § 218.0111. The Dealer's facilities were located at 233 North Main Street, Burlington, Wisconsin. The Dealer was placed out of business effective July 31, 2013.
2. The Dealer had a surety bond satisfying the requirements of Wis. Stat. § 218.0114(5) since June 7, 2011 (Platte River Insurance Company bond number 41228424).

Swihart claim (DOT 15-0004)

3. On May 22, 2012, Sarah Swihart and Benjamin Finco (Swihart and Finco) purchased a 2000 Dodge Durango automobile, vehicle identification number 1B4HS28N5YF218286, from the Dealer for \$4167.80, including sales tax and license and registration fees.

4. Swihart and Finco did not receive a title or plates for the vehicle. On January 17, 2014, Swihart filed a complaint with the Department's Dealer Section against the Dealer. By the time Swihart filed a complaint, the Dealer had closed. The investigator assigned to the complaint contacted Gustave Kozarczwski (Kozarczwski), the former owner/manager of the Dealer. After a series of phone calls and emails, Kozarczwski informed the investigator that an Illinois motor vehicle dealer was holding the title to the vehicle until the Dealer paid for the vehicle. The investigator arranged to have the Department issue temporary plates to Swihart for the vehicle until Kozarczwski was able to obtain the title from the Illinois dealer.

5. As of October 23, 2014, Swihart had not received a title and registration for the vehicle she purchased from the Dealer. On November 10, 2014, Swihart filed a claim against the surety bond of the Dealer. The claim is in the amount of \$3990.00. The claim is itemized as \$3800.00, purchase price of the vehicle, and \$190.00, taxes.

6. Wis. Stat. § 342.16(1), requires motor vehicle dealers to submit applications for titles and registrations to the Department's Division of Motor Vehicles within seven business days of the sale of the vehicle to a retail customer. The Dealer violated this regulation. As a result of the Dealer's violation of Wis. Stat. § 342.16(1), Swihart has not received a title, registration, or license plates for the vehicle she purchased. Therefore, she is unable to lawfully operate it on public roadway as of the expiration date of the temporary plates or to sell the vehicle.

7. Swihart filed a bond claim within three years of the ending date of the period the Platte River Insurance Company bond was in effect and it is, therefore, a timely claim.

8. Swihart sustained a loss as a result of the Dealer's violation of Wis. Stat. § 342.16(1). The loss sustained by Swihart was caused by an act of the Dealer that would be grounds for the suspension or revocation of his motor vehicle dealer license. Accordingly, the claim is allowable. Swihart submitted documentation to support a claim in the amount of \$4167.80, the purchase price, including sales tax and license and registration fees.¹ Because she is unable to lawfully operate or sell the vehicle, Swihart is entitled to a refund of the amount she paid for the vehicle.

¹ Swihart also paid \$154.50 to the Department for temporary certificate of registration. This fee enabled Swihart to operate the vehicle on public highways for approximately one year so it is unnecessary to reimburse her for this cost.

Guman claim (DOT-15-0012)

9. On August 17, 2012, Kenneth Guman (Guman), purchased a 2004 GMC Yukon Denali SUV, vehicle identification number 1GKEK63U04J256743, from the Dealer for \$15,400.00, including sales tax and license and registration fees. Guman financed the purchase of the vehicle through the Marine Credit Union in Fond du Lac, Wisconsin.

10. Guman did not receive a title or plates for the vehicle. Guman operated the vehicle with temporary plates for a period of time. At some point, Guman moved to North Carolina. Sometime in 2014, Guman contacted the Marine Credit Union to obtain a copy of the title for the vehicle. It is not clear what prompted Guman to contact the Marine Credit Union. In his complaint Guman stated he was attempting to register the vehicle in North Carolina. In a complaint file by the Marine Credit Union, an employee of the credit union indicated that Guman told the Marine Credit Union that he was trying to sell the vehicle. Regardless of the reason, during the contact Guman discovered that the vehicle had never been titled and registered in his name.

11. On October 14, 2014, Guman filed a complaint against the Dealer with the Department's Dealer Section. On October 30, 2014, the Marine Credit Union also filed a complaint with the Dealer Section. The investigator assigned to the complaint contacted Kozarczowski. After a series of phone calls and emails, Kozarczowski informed the investigator that an Illinois motor vehicle dealer was holding the title to the vehicle until the Dealer paid for the vehicle. The investigator arranged to have the Department issue temporary plates to Guman for the vehicle until Kozarczowski was able to obtain the title from the Illinois dealer. The temporary plates expired on April 15, 2015.

12. On February 23, 2015, Guman filed a claim against the surety bond of the Dealer. The claim is in the amount of \$24,535.41. The claim is itemized as follows:

DAMAGES CLAIMED	ITEM DESCRIPTION	ITEM AMOUNT
Loan taken for vehicle purchase		\$19,523.41
Storage & loaner fee's – fee's going up weekly		\$ 1,170.00
Tires, Brakes, Tune up, Services, Headlights & fog upgrades		\$ 1,616.60
Insurance that would not cover vehicle in event		<u>\$ 2,225.40</u>

Claim Total: \$24,535.41

13. Wis. Stat. § 342.16(1), requires motor vehicle dealers to submit applications for titles and registrations to the Department's Division of Motor Vehicles within seven business days of the sale of the vehicle to a retail customer. The Dealer violated this regulation. As a result of the Dealer's violation of Wis. Stat. § 342.16(1), Guman has not received a title, registration or license plates for the vehicle he purchased. Therefore, he is unable to lawfully operate it on public roadways as of the expiration date of the temporary plates or to sell the vehicle.

14. Guman filed a bond claim within three years of the ending date of the period the Platte River Insurance Company bond was in effect and it is, therefore, a timely claim.

15. Guman sustained a loss of as a result of the Dealer's violation of Wis. Stat. § 342.16(1). The loss sustained by Guman was caused by an act of the Dealer that would be grounds for the suspension or revocation of his motor vehicle dealer license. Guman submitted documentation to support a claim in the amount of \$15,400 for the purchase price of the vehicle, including sales tax and license and registration fees. This portion of Guman's claim is allowable.

16. Guman has operated the vehicle since he purchased it from the Dealer. According to the MV-11 completed at the time of purchase, the odometer reading was 79,520 miles when Guman purchased the vehicle. In his complaint, Guman indicates the vehicle's odometer read 93,127 miles. It is reasonable for Guman to pay for maintenance and insurance on the vehicle while he was operating it. Guman is seeking \$1,170 for storage and use of a loaner car. Because he is no longer able to lawfully operate or sell the vehicle, Guman is entitled to a refund of the amount he paid for the vehicle. The claim for reimbursement for the storage and a loaner car is for a time period that the Department had issued temporary plates for the vehicle. Accordingly, Guman could have lawfully operated the vehicle during that time period. There is no basis to award him any reimbursement for these expenses. Guman is also seeking reimbursement for the interest he paid on the loan he took out to buy the vehicle. Pursuant to Wis. Admin Code § Trans 140.21(2)9e), claims for interest are expressly disallowed.

DISCUSSION

The procedure for determining claims against dealer bonds is set forth at Wis. Admin. Code Chapter Trans 140, Subchapter II. Wis. Admin Code § Trans 140.21(1) provides in relevant part:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the [licensee's] agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.0116 (1) (a) to (gm), (im) 2., (j), (jm), (k), (m) or (n) to (p), Stats.

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

Accordingly, to allow the claims filed against the security bond of the Dealer, a finding must be made that the Dealer violated one of the sections of Wis. Stat. § 218.0116(1) identified in Wis. Admin. Code § Trans 140.21(1)(c)1, and that the violation caused the loss claimed. With respect to the claims filed by Swihart and Guman, the Dealer violated Wis. Stat. § 342.16(1). A violation of Wis. Stat. § 342.16(1), in turn, constitutes a violation of Wis. Stat. § 218.0116(1)(gm) (having violated any law relating to the sale, lease, distribution, or financing of motor vehicles). Wis. Stat. § 218.0116(1)(gm) is identified in Wis. Admin. Code § Trans 140.21(1)(c)1 as one of the violations upon which a claim against a motor vehicle dealer's bond can be based. Swihart and Guman each sustained a loss as a result of the violation.

CONCLUSIONS OF LAW

1. Sarah Swihart's claim arose on May 22, 2012, the date she and Benjamin Finco purchased the subject vehicle from the Dealer. The surety bond issued to the Dealer by Platte River Insurance Company covers a one-year period commencing on June 7, 2011. The claim arose during the period covered by the surety bond.

2. On November 10, 2014, Ms. Swihart filed a claim against the motor vehicle dealer bond of the Dealer. The bond claim was filed within three years of the last day of the period covered by the surety bond. Pursuant to sec. Trans 140.21(1)(d), Wis. Adm. Code, the claim is timely.

3. Ms. Swihart's loss was caused by an act of the Dealer that would be grounds for suspension or revocation of his motor vehicle dealer license. Ms. Swihart has submitted documentation to support a claim in the amount of \$4,167.80.

4. Kenneth Guman's claim arose on August 17, 2012, the date he purchased the subject vehicle from the Dealer. The surety bond issued to the Dealer by Platte River Insurance Company covers a one-year period commencing on June 7, 2012. The claim arose during the period covered by the surety bond.

5. On February 23, 2015, Mr. Guman filed a claim against the motor vehicle dealer bond of the Dealer. The bond claim was filed within three years of the last day of the period covered by the surety bond. Pursuant to sec. Trans 140.21(1)(d), Wis. Adm. Cod, the claim is timely.

6. Mr. Guman sustained a loss as the result of an act of the Dealer that would be grounds for suspension or revocation of his motor vehicle dealer license. Mr. Guman has submitted documentation to support a claim in the amount of \$15,400.00. Pursuant to Wis. Admin. Code § 140.21(1)(c), this portion of the claim is allowable.

7. The Division of Hearings and Appeals has authority to issue the following orders.

ORDERS

1. The claim filed by Sarah Swihart against the motor vehicle dealer bond of D and Ry's, Inc., d/b/a Roger's Auto Sales is APPROVED in the amount of \$4,167.80. Platte River Insurance Company shall pay Ms. Swihart this amount for her loss attributable to the actions of D and Ry's, Inc., d/b/a Roger's Auto Sales. Upon receipt of the payment Sarah Swihart shall surrender possession of the vehicle to Platte River Insurance Company.

2. The claim filed by Kenneth Guman against the motor vehicle dealer bond of D and Ry's, Inc., d/b/a Roger's Auto Sales is APPROVED in the amount of \$15,400.00. Platte River Insurance Company shall pay Mr. Guman this amount for his loss attributable to the actions of D and Ry's, Inc., d/b/a Roger's Auto Sales. Upon receipt of the payment, Kenneth Guman shall surrender possession of the vehicle to Platte River Insurance Company.

Dated at Madison, Wisconsin on November 20, 2015.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Mark F. Kaiser
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Transportation a written petition for rehearing pursuant to Wis. Stat. § 227.49. A copy of any such petition for rehearing should also be provided to the Administrative Law Judge who issued the order. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Pursuant to Wis. Admin. Code § TRANS 140.26(7), the attached final decision of the Administrative Law Judge is a final decision of the Department of Transportation, so any petition for judicial review shall name the Department of Transportation as the respondent. The Department of Transportation shall be served with a copy of the petition either personally or by certified mail. The address for service is:

Office of General Counsel
4802 Sheboygan Avenue, Room 115B
Wisconsin Department of Transportation
Madison, Wisconsin 53705

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.